NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

American Water Works Company, Inc. a/k/a American Water Works Service Company, Inc. *and* Utility Workers Union of America, AFL–CIO, and its subsidiaries. Case 29–CA–030676

July 31, 2014

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS HIROZAWA AND JOHNSON

On October 16, 2012, Administrative Law Judge Steven Davis issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel[1] and the Charging Party filed answering briefs, and the Respondent filed a reply brief. The General Counsel filed exceptions, the Charging Party filed cross-exceptions and a supporting brief, and the Respondent filed an answering brief to the Charging Party's cross-exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order as modified and set forth in full below.[3]

[1] The General Counsel urges us to strike the Respondent's exceptions because they impermissibly contained legal argument, given that the Respondent also filed a supporting brief. We decline to do so. We find the Respondent's exceptions substantially comport with the requirements of Sec. 102.46 of the Board's Rules and Regulations. See, e.g., *Wal-Mart Stores, Inc.*, 351 NLRB 130 fn. 3 (2007).

[2] We adopt the judge's finding that the Respondent was the initiating party for purposes of Sec. 8(d)(3) of the Act. In doing so, we note the Respondent's failure to serve upon the other parties to the National Benefits Agreement a written notice of proposed contract modification, 60 days prior to the expiration of the agreement, as required by Sec. 8(d)(1) of the Act. However, the Sec. 8(d)(1) notice issue is not before us and, in any event, it would not affect the outcome here.

Member Johnson agrees that the Respondent's actual notice to the FMCS was sufficient, although the better practice would clearly be to provide such notice in writing. He also notes that while the Union may not yet have been the actual agent of all other unions in the bargaining consortium when the Respondent initiated contract modification discussions, the Union was the apparent agent based on the parties' prior national benefits bargaining history. Inasmuch as none of the other unions withdrew from the subsequent bargaining led by the Union, Member Johnson finds it unnecessary to decide what impact such withdrawals might have on the notice issues presented here.

[3] We shall modify the judge's recommended Order to require the Respondent to compensate unit employees for the adverse tax consequences, if any, of receiving lump sum awards, and to file a report with the Social Security Administration allocating the backpay awards for each employee to the appropriate calendar quarters.

ORDER

The National Labor Relations Board orders that the Respondent, American Water Works Company, Inc. a/k/a American Water Works Service Company, Inc., Voorhees, New Jersey, and its subsidiaries, officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Cease and desist from

(a) Failing and refusing to bargain in good faith with the Union by unilaterally implementing the terms of its last, best and final offer which modified and unilaterally changed the terms of the medical plan, the retiree health benefits plan (VEBA), and the short term disability plan set forth in the National Benefits Agreement that expired on July 31, 2010, without complying with the requirements set forth in Section 8(d)(3) of the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain in good faith with the Union for a successor to the National Benefits Agreement that expired on July 31, 2010, and if an understanding is reached, embody that understanding in a signed agreement.

(b) Upon request by the Union, rescind the unilateral changes made to the medical plan, the retiree health benefits plan (VEBA), and the short term disability plan set forth in the National Benefits Agreement that expired on July 31, 2010.

(c) Make whole all unit employees for losses suffered as a result of Respondent's unlawful changes in the terms of the medical plan, the retiree health benefits plan (VEBA), and the short term disability plan set forth in the National Benefits Agreement that expired on July 31, 2010, in the manner set forth in the remedy section of the decision.

(d) Compensate unit employees for any adverse income tax consequences of receiving lump sum backpay awards, and file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each employee.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel rec-

We shall conform the Order to our standard remedial language and shall substitute a new notice to conform to the Order as modified and in accordance with our recent decision in *Durham School Services*, 360 NLRB No. 85 (2014).

ords and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its Voorhees, New Jersey facility, and all of its Subsidiaries' locations, copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 1, 2011.

(g) Within 21 days after service by the Region, file with the Regional Director for Region 29 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. July 31, 2014

Mark Gaston Pearce, Chairman

Kent Y. Hirozawa, Member

Harry I. Johnson, III, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[4] If this order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to bargain in good faith with the Union by unilaterally implementing the terms of our last, best and final offer which modified and unilaterally changed the terms of the medical plan, the retiree health benefits plan (VEBA), and the short term disability plan set forth in the National Benefits Agreement that expired on July 31, 2010, without complying with the requirements of Section 8(d)(3) of the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union in good faith concerning a successor to the National Benefits Agreement that expired on July 31, 2010, and if an understanding is reached, embody that understanding in a signed agreement.

WE WILL, upon request by the Union, rescind the unilateral changes made to the medical plan, the retiree health benefits plan (VEBA), and the short term disability plan set forth in the National Benefits Agreement that expired on July 31, 2010.

WE WILL make whole all of our unit employees for losses suffered as a result of our unlawful changes in the terms of the medical plan, the retiree health benefits plan (VEBA), and the short term disability plan set forth in the National Benefits Agreement that expired on July 31, 2010, with interest.

WE WILL compensate the unit employees for any adverse income tax consequences of receiving lump sum

backpay awards, and WE WILL file a report with the Social Security Administration allocating the unit employees' backpay awards to the appropriate calendar quarters for each employee.

AMERICAN WATER WORKS COMPANY, INC. A/K/A AMERICAN WATER WORKS SERVICE COMPANY, INC.

The Board's decision can be found at www.nlrb.gov/case/29-CA-030676 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.

Tara A. O'Rourke, Esq., for the General Counsel.
Anthony B. Byergo, Esq. (Ogletree, Deakins, Nash, Smoak & Stewart, LLP), Kansas City, Missouri, for the Respondent.
Samuel C. McKnight, Esq. (McKnight, McClow, Canzano, Smith & Radtke, P.C.), Southfield, Michigan, for the Union.

DECISION

STATEMENT OF THE CASE

STEVEN DAVIS, Administrative Law Judge. Based on a charge, a first amended charge, and a second amended charge filed on March 9, March 22, and April 7, 2011, respectively, by Utility Workers Union of America, AFL–CIO (Union) a complaint was issued against American Water Works Company, Inc., a/k/a American Water Works Service Company, Inc. and its subsidiaries[1] (Respondent). The complaint alleges that on about January 1, 2011, the Respondent directly, and/or through its subsidiaries, failed to continue in effect all the terms and conditions of a collective-bargaining agreement entered into on August 1, 2005, which was to remain in effect until July 31, 2010, by unilaterally implementing its last best offer which modified the terms of the medical plan, the retiree health benefits plan (VEBA), and the short term disability plan, which are mandatory subjects of bargaining.

It is further alleged that the Respondent engaged in such conduct (a) without the consent of the union or any of the unions set forth in appendix A of the amended complaint and (b) even though prior written notice or other sufficient notice of the existence of a dispute between it and the Union and/or any of the other unions set forth in appendix A of the amended complaint had not been served on the Federal Mediation and Conciliation Service (FMCS) or on state agencies located in California, Illinois, New Jersey, and Pennsylvania.

The complaint concludes that by the conduct alleged, the Respondent directly, and/or through its subsidiaries, has failed and refused to comply with Section 8(d)(3) of the Act and has therefore failed and refused to bargain with the Union in violation of Section 8(a)(1) and (5) of the Act.

The Respondent's answer denies the material allegations of the complaint, and on August 14, 2012, a hearing was held before me in Brooklyn, New York. Upon the evidence presented in this proceeding and my observation of the demeanor of the witnesses and after consideration of the briefs filed by all parties, I make the following:

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION STATUS

The Respondent, a domestic corporation with its principal office and place of business located at 1025 Laurel Oak Road, Voorhees, New Jersey, by and through its local operating subsidiaries in 14 states of the United States in which it employs about 3500 employees represented by various unions, is engaged in the sale of water and wastewater utilities services to residential, commercial, industrial and other customers, including sale for resale and public authority customers, maintaining and operating water and wastewater facilities, biosolids management, transporting and disposal services to municipalities and industrial customers.

During the past year, the Respondent, in the course and conduct of its business operations described above, purchased and received at its Voorhees, New Jersey facility, goods, services and materials valued in excess of $50,000 directly from outside New Jersey.

The Respondent admits, and I find, that it has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act. The Respondent further admits and I find that the Union and all of the unions set forth in appendix A to the amended complaint, are labor organizations within the meaning of Section 2(5) of the Act.

II. THE APPROPRIATE BARGAINING UNIT

It was stipulated that the employees of the Respondent's subsidiaries who are in the bargaining unit descriptions set forth in appendix A to the amended complaint are in units appropriate for the purposes of collective-bargaining within the meaning of Section 9(b) of the Act.

III. PAST BARGAINING HISTORY

In lieu of local negotiations as to certain employee benefits, including but not limited to the medical plan, the retiree health benefits plan (VEBA), and the short term disability plan, Respondent (on behalf of itself and its subsidiaries) and the Union

[1] Appendix A of the amended complaint, which is hereby incorporated by reference into this Decision, lists the names of all of the units involved, including the Respondent and/or its subsidiary, the location of each of the effected facilities, the name of each of the local unions involved, and a reference to that portion of the collective-bargaining agreement where the unit description is located.

(on behalf of itself and in consortium with other local and national labor unions representing bargaining units in multiple states around the country) have since at least 1980, participated in multiunion bargaining concerning such benefits. The Union has typically led such consortium of representatives of the various participating labor unions in a group called the Union National Benefits Committee.

The national benefits negotiations, set forth above, have typically culminated in the parties agreeing to terms for a new collective-bargaining agreement covering such benefits, including but not limited to the medical plan, "VEBA," and the short term disability plan. Such an agreement has been called the National Benefits Agreement. The most recent such agreement that has been agreed upon and executed by the parties is the 2005–2010 National Benefits Agreement which, by its terms, was to remain in effect through July 31, 2010.

IV. THE CURRENT BARGAINING

David Langford, the Union's president, testified that sometime in the Spring of 2009, he received a phone call from Robert McKeage, the Respondent's Director of Labor Relations.

McKeage told him that he wanted to arrange a meeting "just to get the ball rolling, to get a jump start, expedite early negotiations around the National Benefits Agreement."

The first meeting took place on June 17, 2009, about 1 year before the agreement was to expire. The meeting was held in the Union's office in Washington, D.C. Present for the Respondent was McKeage and Sean Burke, its vice president of human resources. Present for the Union was Langford, National Union Official Shawn Garvey, and George Manoogian, the Union's chief of staff.

McKeage spoke about getting "an early start" in negotiations, and "expediting and getting things out of the way" such as the Union's information requests. He proposed creating a timeline for the entire logistics of national bargaining, including compiling information the Union may request. He spoke about giving the Union a deadline to make such a request. He also suggested ways to move forward with meetings in the future.

Burke spoke about the need to contain the rising cost of health care insurance. Prior to that meeting, the Union had not formulated any proposals, and none were exchanged by the parties at that time. The meeting ended with those present agreeing to arrange future meetings. It was the Respondent's idea to meet again. Langford stated that it was the Respondent's agenda. "We listened to them and . . . . it made sense and we agreed and went along."

McKeage said that he would arrange the meeting dates and locations and send them to the Union for its approval. Manoogian said that the Union would meet anywhere, but the location of the meeting must be in a hotel which has a contract with a union for its employees.

At the time of that meeting, the Union had not met with either its own local unions or the other national and international unions. Nor did the Union have contact information for the other unions. Indeed, Manoogian stated that the union had not spoken to any of the other union representatives until January, 2010. The Union had no authority to speak for other unions which were not present at negotiations. It operates through a consensus with the other labor organizations.

On June 29, McKeage sent Langford an email summarizing the meeting, listing all the union contacts he had, and arranging a meeting on December 1. He asked Langford to provide an information request by December 1, and the Respondent would attempt to gather the data by February or March, 2010.

In an email sent on November 20, 2009, McKeage included an outline of the next meeting scheduled for December 3. It included the naming of the Union's negotiations team, the tentative meeting days for the next four meetings set to begin in late April, 2010, a determination of the source of data to answer the Union's information request which McKeage wanted by February 26, 2010, and the establishment of the ground rules for negotiations, such as internal/external communications, information requests, and start time.

At the December 3 meeting, the parties went over the above agenda items, and McKeage announced that he would be using the Hewitt company to compile data in response to the Union's information request.

On February 26, 2010, Manoogian sent a letter to McKeage, reminding him that the national benefit negotiations were due to begin on May 4. The letter contained a request for information in connection with the upcoming negotiations. It included an extensive list of information requested, such as life insurance, health care benefits, pension and profit sharing, and short term disability. Manoogian asked for additional copies of certain information so that they could be distributed to the other national and international unions who represent the Respondent's employees.

On April 8, 2010, Catherine Raively, McKeage's assistant, sent the Union a detailed list of dates and locations for bargaining sessions set for May and June. The Respondent made the hotel arrangements. Those dates included May 4–5, 25–27, June 22–24, and July 12–15.

Between May 4, 2010 and September 28, 2010, the Respondent, Union, and the other representatives of the participating labor unions continued to bargain with respect to a successor National Benefits Agreement, meeting a total of 15 times at locations in Linthicum, Maryland, Philadelphia, Pennsylvania and Chicago, Illinois.

On May 4, 2010, the Respondent and the Union National Benefits Committee consisting of all the unions involved in the negotiations met for national benefits bargaining in Maryland for a successor National Benefits Agreement. Present for the Respondent was McKeage and Burke. McKeage opened the meeting by stating that he wanted to make opening remarks and that he "would allow the Union to make some opening remarks if we wanted to." Burke's opening remarks related to the high cost of health care which he wanted to cut. He gave his reasons for the necessity to cut costs. The Union's opening remarks concerned reducing the employee copays for insurance. The Respondent and Union exchanged initial proposals for a successor National Benefits Agreement and each side explained its proposals. McKeage testified that in presenting their proposals, each party proposed "specific modifications of the existing National Benefits Agreement."

In June, the Union took a strike authorization vote. On July 20, McKeage sent Manoogian a letter confirming their agreement that negotiations would take place on August 17–19, adding that once the Union has "established a location for this bargaining session, we will make our arrangements as well as contact FMCS for the assistance of a Federal Mediator."

McKeage testified that since no bargaining session had been scheduled to take place before the expiration of the Agreement on July 31, and since the next session would be in Chicago, he decided to call the Chicago office of the FMCS and "seek assistance." He called the FMCS and was told that Javier Ramirez would be assigned as the parties' mediator and that he should call Ramirez. McKeage then phoned Ramirez who agreed to participate.

On August 4, at Ramirez' request, McKeage sent "three remaining proposals that the company has open" to Ramirez, stating in an email that "I will share with you the details of the healthcare and dental design when we meet in Chicago unless you would like to review them prior to that." McKeage also sent additional emails to Ramirez on September 10 and 14. The Union was not copied on any of the emails.

Manoogian testified that he made the arrangements and the hotel reservation for that meeting in a Chicago hotel because McKeage attempted to reserve a hotel in Philadelphia but all the hotels in that city were unavailable on the dates chosen.

One week before the August 17 meeting, Manoogian received a phone call from Ramirez. Manoogian testified that Ramirez told him that the Respondent called his supervisor at FMCS and asked for a mediator. Ramirez asked if Manoogian "had a problem" with that. Manoogian said that he would call him back with an answer. Thereafter, Manoogian agreed to Ramirez' participation.

Prior to receiving the call from Ramirez, Manoogian had not heard of Ramirez, nor had he met him, and had received nothing in writing from him.

At the August 17 meeting, Ramirez introduced himself, saying that he was from the FMCS and was there "to observe." Ramirez was present at the full bargaining session that day, and when both parties spoke about their proposals. However, Ramirez made no comments to either side. Manoogian stated that he may have spoken to Ramirez at that session, but they did not discuss any issues that were of concern to the Union, and that Ramirez was not present at any of the Union's caucuses. He did not know whether the mediator was present at the Respondent's caucuses. Further, Ramirez did not speak to the Union about any of the issues in its counterproposal which it presented to him at the time it was presented to the Respondent. Ramirez did not ask Manoogian any questions about the Union's or the Respondent's counterproposal and there was no discussion between the two men about it. Manoogian stated broadly that Ramirez had no "interaction" with him regarding the issues or the proposals.

On the following day of bargaining, August 18, Manoogian asked Ramirez, privately, if an FMCS Form F-7—"Notice to Mediation Agencies" had been filed with the FMCS for these negotiations. It was stipulated by the parties at the hearing that neither the Respondent nor the Union or any other participating union submitted an FMCS Form F-7 to the FMCS. It was also stipulated that neither the Respondent nor the Union or any other participating union notified any state mediation agency of their dispute. The Union did not object to continuing to bargain in the absence of the Form F-7 being filed.

It was stipulated that Ramirez attended part of the negotiation sessions between the Respondent and the Union National Benefits Committee on August 17, 18 and 19, 2010, in Chicago, and that he also attended the September 16, 2010 session in Linthicum Heights, Maryland. Manoogian testified that at the September 16 meeting, Ramirez asked the parties whether either of them asked why he was present. He then said that "I'm putting it on the record. I'm an observer." Manoogian stated that he asked McKeage if he would agree that all that Ramirez had been doing is observing and McKeage said yes. McKeage has a different recollection. He stated that Ramirez entered the Respondent's caucus room and said that the Union claimed that they were "no longer interested in his services." McKeage testified that he never indicated that he believed that Ramirez' services were not useful.

During the negotiations, the Respondent stated its view that negotiations had to conclude by late September, 2010, in order for annual open enrollment information for medical insurance to be prepared and timely provided to employees for the 2011 plan year. The Unions involved in the bargaining disagreed with Respondent's assertion that it was under a deadline for open enrollment because Respondent maintains a self-funded medical insurance plan.

At the September 16 session, after Ramirez left, McKeage gave the Union its last, best and final offer. Thereafter, the Union made a counteroffer which the Respondent rejected.

In January, 2011, the Respondent implemented its last, best and final offer. In April, 2011, the Union made another counterproposal.

As of late September, 2010, Respondent and the Union National Benefits Committee were unable to reach a new successor agreement to the 2005–2010 National Benefits Agreement. The parties stipulated that "most pertinently, the parties had substantial and fundamental differences as to coverage levels and costs for medical insurance."

On October 10, the Union membership rejected the Respondent's offer at a ratification vote. Thereafter, in October, 2010, Respondent advised all employees covered by the benefit plans negotiated as part of the national benefits negotiations that, effective January 1, 2011, Respondent would be unilaterally implementing its last, best and final offer regarding the benefits covered by the National Benefits Agreement. The parties stipulated that the unions were aware of this notification by the Respondent to its employees.

Effective January 1, 2011, the Respondent implemented the terms of its last, best and final offer which modified the terms of the medical plan, the retiree health benefits plan (VEBA), and the short term disability plan.

V. EVIDENCE FROM STATE AGENCIES

Officials from mediation agencies for the states of New Jersey and Pennsylvania testified as to the procedures utilized in their agencies.

William Gross, the director of the bureau of mediation for Pennsylvania, testified that parties to labor disputes send his office copies of the FMCS Form F-7. After receiving the form, he assigns a mediator from his office or one of the regional offices, and sends a letter notifying the parties that a mediator has been selected, and that he or she should be contacted if assistance is needed.

Gross stated that in the type of multistate bargaining involved here, where certain employees of the Respondent are employed in Pennsylvania, if he had received a Form F-7 form or a phone call from a party requesting assistance, he would have assigned a mediator or offered mediation services to the parties. He added, however, that typically, parties to multistate bargaining would not call his office for the assignment of a mediator. He further added that he would not send a mediator to California because of budget limitations. However, if he received a request for a mediator in Trenton, New Jersey, which is near the Pennsylvania border, he would "conceivably" have honored that request, but he would have contacted the New Jersey mediation service first.

Ernest Whelan, the executive secretary of the New Jersey Board of Unions for the New Jersey Department of Labor, testified that he frequently receives copies of Form F7 from parties engaged in labor disputes. When such a notice is received he sends a letter to the parties offering the services of a mediator. If the parties request a mediator, one is assigned.

Whelan testified that he knew of no reason why his office could not mediate a dispute where employees of the employer worked in both New Jersey and Pennsylvania. He stated that his office would become involved depending on the "severity of the case and its impact on New Jersey residents"—for example, if the matter involved a hospital or utility company.

He opined that if his office received a notice from the Respondent, a water utility having a multistate bargaining unit, he would have offered the services of a mediator if any party requested his assistance.[2] Indeed, Whelan stated that he has received F-7 notices from employers regarding contracts covering employees who are employed in more than one state. Whelan further stated that his office and the FMCS often "co-mediate" disputes.

Counsel for the General Counsel offered in evidence, and I received printouts from the States of California and Illinois which set forth that those states provide mediation and conciliation services.

The Positions of the Parties

The General Counsel first argues that the Respondent is the party desiring the modification of the contract between it and the Union and therefore the Respondent was required to serve the notices set forth above. General Counsel further argues that inasmuch as the proper notices were not given to the FMCS or state agencies, the Respondent was precluded from implementing unilateral changes in its last best offer.

The Respondent first argues that the Union was the initiating party and therefore the Union was obligated to notify those agencies. Alternatively, the Respondent contends that if it did have an obligation to notify the FMCS, it did so in its call to the FMCS office in Chicago which assigned mediator Ramirez. The Respondent, conceding that it did not notify any state agency, contends that it would have been futile to notify a state agency because no state agency had "jurisdiction" to mediate a dispute over a multistate bargaining agreement.

Analysis and Discussion

I. SECTION 8(D)(3) AND THE INITIATING PARTY

The complaint, as tried here, alleges essentially that by failing to comply with the notification provisions of Section 8(d)(3) the Respondent violated its obligation to bargain in good faith with the Union when it unilaterally implemented its last best offer, thereby changing the terms of three provisions of its expired collective-bargaining agreement.[3]

Section 8(d)(3) of the Act provides, in material part, as follows:

> *Provided,* that where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—
> Notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territory where the dispute occurred, provided no agreement has been reached by that time.

As set forth above, the party seeking to terminate or modify a current contract has the obligation to notify the FMCS and the State of the existence of a dispute.

I find, as argued by the General Counsel, that the Respondent was the party which sought to modify the contract. As set forth above, more than 1 year before the contract was due to expire, Respondent's official McKeage made the first contact with the Union, asking to "expedite early negotiations." He took the initiative in setting the dates and locations of the upcoming meetings and sending them to the Union for its approval. He prepared the agendas for the meetings, announcing the Respondent's most important demands, even at a time when the Union had not met with the other unions to form a consensus as to what their demands would be. McKeage gave the Union a deadline for making an information request, and he set the ground rules for the negotiations.

II. THE RESPONDENT'S ARGUMENTS CONCERNING THE INITIATING PARTY

The Respondent argues that the "preliminary discussions" about future negotiations which took place more than 1 year before the contract expired is not relevant to which party is considered the initiating party. The Respondent further argues that the Union was not the authorized representative of the multiunion National Benefits Committee during the preliminary

[2] If one party to a dispute did not agree to the assistance of a mediator, the mediator would attend the caucuses of the party that agreed to his presence. When the other party invited him to mediate the dispute, then he would become fully involved.

[3] There are no issues of impasse in bargaining before me.

discussions from June through December, 2009, and therefore the Union had no legal authority with respect to the Union National Benefits Committee. In addition, according to the Respondent, Section 8(d)(3) requires that notices be between "parties" to the contract, and since the parties to the expiring contract were the Respondent and the Union National Benefits Committee, any discussions had by the Union with the Respondent were of no legal effect.

Finally, the Respondent contends that the Union was the initiating party because it sent a letter to McKeage reminding him that negotiations were due to begin in May, and which contained a request for information.

I reject these arguments. The question posed by the statute is which party desires to modify the contract. Preliminary discussions may provide an answer to that question. Initial discussions or contacts between the parties clearly show who the initiating party is. The first party to express a desire to modify a contract may certainly be considered the party who may be identified as the initiating party. Here, undoubtedly, as set forth above, the Respondent took the lead in contacting the Union long before the contract was due to expire, and aggressively took charge of arranging meeting dates and locations and expressing its main area of concern in their first meeting.

As to the other arguments concerning whether the preliminary discussions had any legal effect because the Union was not yet authorized by the other unions to act in its behalf, it was stipulated that, at least since 1980, the Union, on behalf of itself and in consortium with other local and national labor unions has participated in such bargaining and that the Union has typically led such consortium of representatives of the participating unions known as the Union National Benefits Committee.

Accordingly, whether or not the Union had technically been authorized, at the time of the preliminary discussions, to formally represent the other unions as it had done for nearly 30 years, the fact is that the Respondent deliberately reached out to the Union undoubtedly with the knowledge that it would once again negotiate on behalf of the other unions. Respondent dealt with the Union in those preliminary discussions as it reasonably expected that it would negotiate on behalf of the other unions. The Respondent may or may not have been aware that the Union had not spoken to any of the other union representatives until January, 2010, but nevertheless, the Respondent at the June, 2009 meeting held in the Union's office spoke with the Union's president Langford and its chief of staff Manoogian about the logistics of bargaining, suggested ways to move the bargaining forward, and presented its major demand, the control of health care costs to the Union.

Thus, whether or not the Union was by that time the authorized representative of the consortium, it was regarded that way by the Respondent with which it dealt as a bargaining partner. Those preliminary discussions therefore establish that the Respondent was the initiating party and was obligated to notify the FMCS and any state agency concerning the existence of a dispute.

I also reject the Respondent's argument that the Union was the initiating party based on its letter to the Respondent on February 26, 2010. The letter was a response to McKeage's demand that any information request of the Union must be filed by February 26, 2010. The letter contained a reminder to McKeage that the negotiations were due to begin on May 4.

The Respondent argues that this was the first written communication by the Union after it had contacted the other union parties in the multiunion consortium in January, 2010. The Respondent argues from this that the letter was the first correspondence in which the Union was acting in behalf of the other unions and constituted "written notice of the intent to commence negotiations . . . and negotiate" regarding the topics mentioned in the letter as to which information was sought.

I reject the Respondent's argument that this letter made the Union the initiating party and thereby placed the burden on the Union to notify the FMCS and any state agency of the existence of a dispute. The letter, sent after two meetings had been held between the parties, and more than 8 months after the parties' first meeting, was simply a request for information pursuant to the Respondent's suggestion that one be made by that time. It did not transform the Union into the initiating party. The Respondent had become the initiating party in the Spring of 2009, when it first contacted the Union in an effort to expedite negotiations.

III. THE OBLIGATION TO NOTIFY THE FMCS AND ANY STATE AGENCY

I accordingly find that the Respondent is the initiating party since it first sought to modify the parties' contract. It has long been held, consistent with the clear language in Section 8(d)(3), that the "burden of notifying the mediation services of a dispute under Section 8(d)(3) rests exclusively with the initiating party" *United Artists Communications,* 274 NLRB 75, 77 (1985). In *Nabors Trailers*, 294 NLRB 1115, 1120 (1989), the Board found that the employer was the initiating party "by serving notice to open negotiations."

Inasmuch as I find that the Respondent was the party desiring to modify the contract, it had an obligation to notify the mediation services.

IV. NOTIFICATION TO THE FMCS AND ANY STATE AGENCY

Section 8(d)(3) of the Act requires that the party desiring to modify a current contract must notify the FMCS and any state where the dispute occurred. The form of notification is not set forth in the statute. Accordingly such notification need not be in writing.

General Counsel argues, however, pursuant to 29 CFR Section 1402.1, the notification must be in writing. That FMCS regulation states that "the notice of dispute field with the FMCS pursuant to the provisions of Section 8(d)(3) . . . shall be in writing. The following Form F-7, for use by the parties in filing a notice of dispute, has been prepared by the Service." I do not agree with the General Counsel. The internal regulation of the FMCS cannot modify Section 8(d)(3) of the Act which does not require that the notification be in writing.

I find that the Respondent statutorily notified the FMCS when McKeage called the Chicago FMCS office in late July requesting its assistance in the negotiations. Mediator Ramirez was assigned to assist the parties and he attended a total of four bargaining sessions in Illinois and Maryland. Whether or not

Ramirez contributed to the negotiations in a significant way, or contributed at all, as disputed by the parties, is irrelevant to the question of whether the Respondent "notified" the FMCS of the existence of the dispute as required by Section 8(d)(3). The evidence establishes that the Respondent met its statutory obligation by phoning the FMCS and requesting its assistance.

Section 8(d)(3) also requires that the initiating party notify "any state . . . agency established to mediate and conciliate disputes within the State . . . where the dispute occurred" The complaint alleges that the Respondent failed to notify the California State Department of Industrial Relations, the Illinois State Department of Labor, the State of Pennsylvania Department of Labor and Industry and the New Jersey State Board of Mediation.

The Respondent contends that it was not required to notify any state agency because no state agency had jurisdiction over this multistate dispute. The Respondent notes that these were multistate, multiunit negotiations involving 66 bargaining units across 15 states with negotiations being conducted in three states—Pennsylvania, Maryland and Illinois.

The Respondent argues that "none of the state agencies has any interest concerning labor negotiations, bargaining units and employees in other states. They have no legal authority to assert extraterritorial jurisdiction over matters outside their states."

I do not agree with the Respondent. Indeed, the representative from the New Jersey mediation agency stated that his office mediates disputes involving employees employed by one employer in multiple states, and that it also comediates disputes with the FMCS.

Section 8(d)(3) requires notification to the state where the dispute occurred. Clearly, the dispute involved here occurred in each of the states in which there is a collective-bargaining agreement set to expire and which could cause disruption. The state agencies in any and each of those states could have been asked for their assistance.

In *Boghosian Raisin Packing Co.,* 342 NLRB 383, 384 (2004), the Board stated that Section 8(d) is a "clear expression of Congressional intent to minimize the interruption of commerce resulting from strikes and to further the use of mediation to assist parties in settling their labor disputes peaceably." In *Amalgamated Meatcutters, Local 576,* 140 NLRB 876, 879 (1963), the Board noted that the purpose of Section 8(d)(3) is to "afford Federal and State mediation authorities an opportunity to settle labor disputes before they reach the strike stage." In that case, the Board found, as I find here, that the respondent notified the FMCS but failed to notify the state agency as required by the statute.

Accordingly, it is clear that the statutory purpose of Section 8(d)(3) is to utilize whatever services are available to settle the dispute. The Respondent called the FMCS office in Chicago when it knew that it would be bargaining in that city. It would have been just as helpful if it had also asked the Illinois State Department of Labor for its assistance.

The Respondent need not be concerned with which state agency had jurisdiction or which agency had the funds to send a mediator to a different state. It was obligated only to "notify" a state agency where the dispute occurred. It did not do so.

Based upon the above, I find that the Respondent failed to notify any State agency in violation of its obligation to do so under Section 8(d)(3) of the Act.

V. THE RESPONDENT'S UNLAWFUL IMPLEMENTATION OF ITS LAST OFFER

On January 1, 2011, the Respondent implemented the terms of its last, best and final offer which modified the terms of the medical plan, the retiree health benefits plan (VEBA), and the short term disability plan. I find that by doing so without having provided the required notice to any State agency pursuant to Section 8(d)(3), the Respondent violated Section 8(a)(1) and (5) of the Act. *Whitesell Corp*., 352 NLRB 1196, 1196 (2008*); Raymond F. Kravis Center for the Performing Arts,* 351 NLRB 143, 143–144 (2007).

Although those cases apply to a failure to give notice to the FMCS, a failure to give notice to any State agency is equally applicable.

> Section 8(d) is unequivocal. It provides that the duty to bargain includes serving written notice upon the other party to a collective-bargaining agreement of one's desire to terminate or modify it, with notice also to the Federal Mediation and Conciliation Service and the appropriate state agency.
>
> Board authority is also unequivocal. Failure of a party desiring to terminate or modify a collective-bargaining agreement to give appropriate notice under Section 8(d)(3) precludes it from altering terms or conditions of the collective-bargaining agreement.
>
> *Days Hotel of Southfield,* 306 NLRB 949, 956 (1992).

CONCLUSIONS OF LAW

1. The Respondent American Water Works Company, Inc., a/k/a American Water Works Service Company, Inc. and its subsidiaries is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.
2. The Union and all of the unions set forth in appendix A to the amended complaint, are labor organizations within the meaning of Section 2(5) of the Act.
3. By unilaterally implementing the terms of its last, best and final offer which modified and unilaterally changed the terms of the medical plan, the retiree health benefits plan (VEBA), and the short term disability plan set forth in the contract that expired on July 31, 2010, without complying with the requirements of Section 8(d)(3) of the Act the Respondent violated Section 8(a)(1) and (5) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent unilaterally implemented certain changes in its contract, including the terms of the medical plan, the retiree health benefits plan (VEBA), and the short term disability plan, the Respondent shall be ordered to rescind those unilateral changes, restore the status quo prior to the January 1, 2011 implementation of its final offer, and to make employees whole for any loss of wages or benefits that they

may have suffered as a result of those changes. *Raymond F. Kravis*, above, at 149; *Bohemian Club*, 351 NLRB 1065, 1068 (2007*); Grand Rapids Press,* 325 NLRB 915, 916 (1998); *Goya Foods of Florida,* 356 NLRB No. 184 (2011). The employees shall be made whole in the manner set forth in *Ogle Protection Service,* 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), plus daily compound interest as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010).

The Respondent shall also be ordered to bargain on request with the Union about the terms of its last offer which it unilaterally implemented.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[4]

ORDER

The Respondent, American Water Works Company, Inc. a/k/a American Water Works Service Company, Inc., and its Subsidiaries, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unilaterally implementing the terms of its last, best and final offer which modified and unilaterally changed the terms of the medical plan, the retiree health benefits plan (VEBA), and the short term disability plan set forth in the contract that expired on July 31, 2010, without complying with the requirements of Section 8(d)(3) of the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make whole all unit employees for losses suffered as a result of our unlawful changes in the manner set forth in the Remedy section of this Decision.

(b) Upon request by the Union, bargain with the Union in good faith concerning the terms of its last offer which it unilaterally implemented, including the medical plan, the retiree health benefits plan (VEBA), and the short term disability plan.

(c) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its Voorhees, New Jersey facility, and all of its Subsidiaries' locations, copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 1, 2011.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. October 16, 2012

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT unilaterally implement the terms of our last, best and final offer which modified and unilaterally changed the terms of the medical plan, the retiree health benefits plan (VEBA), and the short term disability plan set forth in the contract that expired on July 31, 2010, without complying with the requirements of Section 8(d)(3) of the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL make whole all of our unit employees for losses suffered as a result of our unlawful changes in the terms of the medical plan, the retiree health benefits plan (VEBA), and the

[4] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[5] If this order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

short term disability plan set forth in our contract that expired on July 31, 2010.

WE WILL upon request by the Union, bargain with the Union in good faith concerning the terms of our last offer which we unilaterally implemented, including the medical plan, the retiree health benefits plan (VEBA), and the short term disability plan.

AMERICAN WATER WORKS COMPANY, INC. A/K/A AMERICAN WATER WORKS SERVICE COMPANY, INC.